

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**FOR THE STATE OF DELAWARE**

**AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
COUNCIL 81, LOCAL 218,**

Charging Party,

v.

**BRANDYWINE SCHOOL DISTRICT,**

Respondent.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**ULP No. 07-05-570**

Probable Cause Determination

**BACKGROUND**

The Brandywine School District ("District") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994).

The American Federation of State, County and Municipal Employees, Council 81, Local 218 ("AFSCME") is the exclusive representative of certain employees of the District for purposes of collective bargaining pursuant to section 1302(j) of the Public Employment Relation Act, 19 Del.C. Chapter 30, ("PERA").

AFSCME and the District were parties to a collective bargaining agreement with an expiration date of June 30, 2006.

On or about May 10, 2007, AFSCME filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging conduct by the District in violation of Section 1307(a)(5) of the PERA, which provides:

§1307(a)      It is an unfair labor practice for a public employer  
or its designated representative to do any of the

following:

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

The Charge alleges that on or about July 19, 2006, the District notified AFSCME of its intent to terminate the negotiated Agreement between the parties. By letter dated November 15, 2006, the District notified PERB that said Agreement was no longer in effect. On January 19, 2007, AFSCME filed a Level I grievance protesting the District's failure to honor Article 9, TRANSFERS, Sections 9.2.4 and 9.2.5 of the collective bargaining agreement which provide:

9.2.4 Where because of Operational necessity, permanent transfers are required, and such transfers are involuntary, the least senior qualified Employee within a given job site or job classification will be transferred except where it is necessary to satisfy the requirements of law, affirmative action programs, a person other than the least senior qualified person may be involuntarily transferred. Permanent transfers will not be made for arbitrary or capricious reasons. The Employee being transferred may bump a less senior Employee in the same job classification. If that occurs, the Employee may bump another Employee less senior and so forth until the position is filled.

9.2.5 Employees may be temporarily transferred to meet operation requirements of the District. When such temporary transfers are involuntary, such assignment shall not exceed sixty calendar days, after which the Employee shall be returned to the original position.

On January 9, 2007, the District denied the grievance for the reasons that it was untimely filed and that sections 9.2.4 and 9.2.5 constitute non-mandatory subjects of bargaining which expired when the District terminated the Agreement in July, 2006.

On March 1, 2007, the grievance was appealed to Level II where it was again denied for the same reasons.

The District filed its Answer on or about May 21, 2007, essentially denying that it has violated any of its statutory duties under Title 19 of the Delaware Code Chapter 13.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the Charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will review such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, Del.PERB Probable Cause Determination, ULP No. 04-10-453, V PERB 3179, 3182 (2004).

There is little, if any, dispute as to the material facts alleged in the Charge which are documented in attachments to the Charge. The District's Answer is that it made a good faith attempt to determine which contract provisions involved mandatory subjects

of bargaining and were, therefore, required to be continued and which were not and, therefore, able to be discontinued. The District claims the attachments speak for themselves.

### **DETERMINATION**

Considered in a light most favorable to the Charging Party, the pleadings constitute probable cause to believe that an unfair labor practice may have occurred. The issue is whether or not sections 9.2.4 and 9.2.5 of the terminated collective bargaining agreement involve mandatory subjects of bargaining. If the answer is in the affirmative the District may not unilaterally alter the status quo of such subjects. If the answer is in the negative the District is not bound to continue to apply those specific provisions.

Appoquinimink Ed. Assn, DSEA/NEA v. Appoquinimink Bd. of Ed., Del PERB, ULPNo. 98-09-243, III PERB 1785, 1807 (1998).

Based on the pleadings, there is no reason to hold a hearing to establish a factual record. Presented with a purely legal question, the parties are to file simultaneous written briefs in support of their respective positions concerning the designated issue.

**IT IS SO ORDERED.**

DATE: 15 June 2007

---

Charles D. Long, Jr.,  
Executive Director  
Del. Public Employment Relations Bd.